

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001

May 27, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. YORK 2010-205-M
Petitioner	:	A.C. No. 18-00017-212386 x358
v.	:	
	:	
B&J EXCAVATING, INCORPORATED,	:	Mine: Union Bridge, MD / LeHigh Cement
Respondent	:	

**DECISION**

Appearances: Matthew Epstein, Esq., Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for the Petitioner  
Steven D. Sandbrook CMSP, President, Eagle Mine Safety, Inc., Nazareth,  
Pennsylvania, for the Respondent

Before: Judge Koutras

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), (the “Mine Act”). This matter concerns an alleged violation of the mandatory safety standard 30 C.F.R. § 56.9315. Citation No. 6537795, a 104(d)(1) violation, was served on the respondent on January 11, 2010. This alleged violation was found to be significant and substantial, (hereafter “S & S”), and an unwarrantable failure. The cited mandatory safety standard requires the control of dust at muck piles, material transfer points, crushers, and on haulage roads where hazards to persons would be created as a result of impaired visibility. In this case, the alleged violation is in connection with reduced visibility on the quarry haulage roads.

A hearing was held in Frederick, Maryland, on March 8, 2011, and the parties appeared and participated fully therein. The critical issue was whether the violation was the result of the respondent’s unwarrantable failure to comply with the cited safety standard, which resulted in a proposed civil penalty assessment of \$3,689.

The inspector issued the citation because he believed the most effective way to control roadway dust was through the application of water. The respondent agreed that dust could have been controlled by applying water, but also believed that the dust could have been controlled using other methods. The respondent asserted that it acted to control the dust by scraping the road and

applying clean stone, and by reducing the speed limit. The respondent contends that it did not initially apply water to the road because it was restricted from doing so by Lehigh Cement's quarry foreman, who had authority to permit the use of water to control the dust. Lehigh Cement chose not to initially allow the respondent to apply water to the road due to freezing temperatures. (Tr. 79 - 82).

Mr. Bartsch, the respondent's representative, testified that attempts to control the dust without the use of water began at 6:00 a.m., and were ongoing when he arrived at 11:00 a.m.; approval for using water started at 2:00 p.m. He explained the procedures to safely control truck traffic during that time. (Tr. 87 - 92).

At the close of all of the testimony, the petitioner's counsel requested a short recess to further confer with the inspector, and the respondent's representative. Upon resumption of the hearing on the record, counsel stated that the parties agreed to settle the matter by modifying the Section 104(d)(1) unwarrantable failure citation to a Section 104(a) "S & S" citation, with a moderate negligence finding and a penalty assessment of \$2,000.

In support of the settlement proposal, petitioner's counsel agreed that the respondent's failure to use water to control the dust was due to its limited options based on contractual limitations with the mine operator, Lehigh Cement. Under these circumstances, counsel agreed that the attempts and efforts by the respondent to control the dust were mitigating circumstances that warranted the issuance of a Section 104(a) citation rather than a Section 104(d)(1) unwarrantable failure citation. (Tr. 114-115).

In addition to the aforementioned mitigating circumstances, which I accept as a reasonable and credible compromise of this case, I have considered the stipulations by the parties that the respondent abated the citation in good faith, that it is a small to medium sized contractor, that the assessed civil penalty will not adversely affect its ability to continue in business, and with a relatively good prior history of eight violations in the past 15 months, none of which is the same as the one issued in this case. (Tr. 6 - 8).

Wherefore, in view of the foregoing and after consideration of the criteria set forth in Section 110(i) of the Mine Act, I conclude and find that the settlement agreed to by the parties in this case is appropriate and in the public interest and it is **APPROVED**. My prior approval on the record is **RE-AFFIRMED**.

The contested Section 104(d)(1) "S & S" Citation No. 6537795 that was issued on January 11, 2010, is modified to a Section 104 (a) "S & S" citation, with a "moderate negligence" finding and a civil penalty of \$2,000 is assessed.

The respondent is **ORDERED** to pay the \$2,000 civil penalty assessment within 30 days of the date of this decision. Payment shall be made to the Mine Safety and Health Administration, U. S. Department of Labor, Payment Office, P. O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, this matter is **DISMISSED**.

George A. Koutras  
Administrative Law Judge

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